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SUPREME COURT OF THE UNITED STATES.

No. 90.

THE UNITED STATES, PLAINTIFFS.

vs.

HEZEKIAH H. GEAR.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT UNITED STATES FOR ILLINOIS.

INDEX.

	Original.	Print.
Declaration - - - - - - - - - -	1	2
Defendants' pleas - - - - - - - - -	3	3
Replication of plaintiffs - - - - - - - -	5	5
Adjourned questions - - - - - - - -	7	6
Clerk's certificate - - - - - - - -	8	6

J. & G. S. GIDEON, printers.

Pleas before the honorable the judges of the circuit court of the United States for the district of Illinois, at the June term of said court, and on the 14th day of said term, in the year of our Lord one thousand eight hundred and forty-three, and of our independence the 67th. Present, Hon. John McLean, presiding judge, Hon. Nathaniel Pope, judge.

THE UNITED STATES OF AMERICA, vs. HEZEKIAH H. GEAR. } *Trespass quare clausum fregit.*

The plaintiffs having filed their declaration, as follows, to wit: The United States of America, by Justin Butterfield, their attorney, complain of Hezekiah H. Gear, who has been duly summoned, &c., of a plea of trespass—

1. For that the said defendant, on the first day of January, in the year one thousand eight hundred and thirty-eight, and on divers other days and times between that day and the commencement of this suit, with force and arms, &c., broke and entered, divers, to wit, four closes of the said plaintiffs, situate, lying, and being in the county of Jo Daviess, in the district aforesaid, and then and there dug up the mineral lead ore of the said plaintiffs, then being in and upon the said closes, and then and there took and carried away the said mineral lead ore, to wit, twenty millions of pounds thereof of the said plaintiffs, of great value, to wit, of the value of ten thousand dollars.

2. And also, for that the said defendant, on the first day of January, in the year one thousand eight hundred and thirty-eight, and on divers other days and times, between that day and the day of the commencement of this suit, with force and arms, &c., broke and entered a certain close of the said plaintiffs, situate and lying in the county of Jo Daviess, in the district aforesaid, and being the north half of section twenty-three, (23,) township twenty-nine (29) north, range one (1) east, fourth principal meridian, and then and there dug up from the said close the mineral lead ore of the said plaintiffs, and then and there being in and upon said close, and took and carried away off and from the said close the same, to wit, twenty millions of pounds of great value, to wit, of the ten thousand dollars, and converted and disposed thereof to his own use.

3. And also, for that the said defendant, on the first day of January, in the year one thousand eight hundred and thirty-eight, and on divers other days and times between that day and the day of the commencement of this suit, with force and arms, &c., broke and entered a certain close of the said plaintiffs, situated and lying in the county of Jo Daviess, in the district aforesaid, and being the south half of fractional section eight, (8,) township twenty-eight

(28) north, range one (1) east, of the fourth principal meridian, and then and there dug up from the said close the mineral lead ore of the said plaintiffs, then and there lying in and upon the said close, and took and carried away off and from the said close the same, to wit, twenty millions of pounds thereof, of great value, to wit, of the [sum] of ten thousand dollars, and converted and disposed thereof to his own use.

4. And also, that the said defendant, on the first day of January, in the year one thousand eight hundred and thirty-eight, and on divers other days and times between that day and the day of the commencement of this suit, with force and arms, &c., to wit, in the county and district aforesaid, dug up a large quantity, to wit, ten millions of pounds of mineral lead ore of the said plaintiffs, of great value, to wit, of the value of ten thousand dollars, then being in and upon certain lands there situate, and took and carried away the same, and converted and disposed thereof to his own use.

And also, for that the said defendant, on the first day of March, in the year one thousand eight hundred and forty-three, with force and arms, &c., to wit, at the county of Jo Daviess, in the district aforesaid, seized, took, and carried away certain, to wit, ten millions of pounds of mineral lead ore of the said plaintiffs, of great value, to wit, of the value of ten thousand dollars, there then found and being, and converted and disposed of the same to his own use, and other wrongs to the said plaintiffs then and there did, to the great damage of the said plaintiffs, and against the peace of the United States of America; wherefore the said plaintiffs say that they are injured, and have sustained damage, to the amount of ten thousand dollars, and therefore they bring suit, &c.

J. BUTTERFIELD, *Plffs. atty.*

And the defendant having filed his pleas, as follows, to wit:

2. And for a further plea as to the said several supposed trespasses in said first count of said declaration mentioned, the said defendant says actio non, because he says that all the said supposed trespasses in said count mentioned, if any, were committed on certain premises in said county, to wit, one hundred and sixty acres of land, or one quarter section, being the northwest quarter of section twenty-three, township twenty-nine north, range one east, fourth principal meridian; and the said defendant further says that he, the said defendant, settled, resided on, and occupied said quarter section in the year 1827, and cultivated a part thereof, and hath ever since hitherto remained, continued, and still is, in the possession thereof, and made large and valuable improvements thereon, and hath cultivated a part thereof in each and every year during all the time aforesaid, and was and still is lawfully entitled to the pre-emption right to said quarter section, and to possess and cultivate the same, and to enjoy all the benefits and advantages thereof during all the time in said count mentioned, and still is. Said pre-

mises being subject to pre-emption rights, and not yet offered for sale by the President's proclamation, and by reason whereof he, the said defendant, did dig lead ore or mineral on said quarter section during the time in said count mentioned, as he lawfully might do, for the reasons aforesaid, and which are the same supposed trespasses in the introductory part of his plea mentioned; and this the defendant is ready to verify, &c., and therefore he prays judgment, &c.

3. And for a further plea as to the said second count of said declaration, and as to the said supposed trespass therein mentioned, the said defendant says (actio non,) because he says that all the said supposed trespasses in said count mentioned, if any, were committed on a certain part of said premises in said count mentioned, to wit, the northwest quarter section of section twenty-three, township 29 north, R. one east, fourth P. M.; and the said defendant further says that he, the said defendant settled, resided on, and occupied said quarter section in the year 1827, and cultivated a part thereof, and hath ever since hitherto remained, continued, and still is, in the possession thereof, and made large and valuable improvements thereon, and hath cultivated a part thereof in each and every year during all the time aforesaid, and was and still is lawfully entitled to the pre-emption right to said quarter section, and to possess and cultivate the same, and to enjoy all the benefits and advantages thereof during all the time in said count mentioned, and still is. Said premises being subject to pre-emption rights, and not yet offered for sale by the President's proclamation, and by reason whereof he, the said defendant, did dig lead ore or mineral on said section during the time in said count mentioned, as he lawfully might do, for the reasons aforesaid, and which are the same supposed trespasses in the introductory part of this plea mentioned; and this the defendant is ready to verify, &c., and therefore he prays judgment, &c.

6. And for a further plea as to the said third count of said declaration, and as to the said supposed trespass therein mentioned, the said defendant says (actio non,) because he says that all the said supposed trespasses in said count mentioned, if any, were committed, on a certain part of said premises in said count mentioned, to wit, the south half of quarter section of section eight in said count mentioned, containing less than 160 acres, or one quarter section. And the said defendant further says that he, the said defendant, settled, resided on, and occupied said quarter section in the year 1827, and cultivated a part thereof, and hath ever since hitherto remained, continued, and still is, in the possession thereof, and made large and valuable improvements thereon, and hath cultivated a part thereof, in each and every year during all the time aforesaid, and was and still is lawfully entitled to the pre-emption right to said quarter section, and to possess and cultivate the same, and to enjoy all the benefits and advantages thereof,

during all the time in said count mentioned, and still is. Said premises being subject to pre-emption rights, and not yet offered for sale by the President's proclamation, and by reason whereof he, the said defendant, did dig lead ore or mineral, on the said quarter section, during the time in said count mentioned, as he lawfully might do for the reasons aforesaid, and which are the same supposed trespasses in the introductory part of this plea mentioned; and this the defendant is ready to verify, &c., and therefore he prays judgment, &c."

To which pleas the plaintiffs replied as follows, to wit:

"And the said plaintiffs, as to the said second plea of the said defendant to the first count of the said declaration, say, (precludi non,) because they say that the said quarter section of land, in the said second plea mentioned, is and always hath been the land of the plaintiffs, and always has contained, and still does contain, a valuable lead mine; and that the said lead mine was well known to the defendant before and at the time he settled upon the said quarter section of land, in manner and form as in his plea alleged, and this he is ready to verify; wherefore they pray judgment, and their damages by them sustained, by reason of said trespasses in the said first count of said declaration mentioned.

"And the said plaintiffs, as to their third plea of the said defendant to the said second count of the said declaration, say, (precludi non,) because they say that the said quarter section of land, in that plea mentioned, always has contained, and still does contain, a lead mine of great value, which said lead mine was discovered, and well known to the defendant, before and at the time he settled upon the said quarter section of land in that plea mentioned; and this they are ready to verify; wherefore, they pray judgment, and their damages by them sustained, by reason of the commission of the said trespasses in the said second count of the said declaration."

"And the said plaintiffs, as to the said sixth plea of the said defendant to the third count of the said declaration, say, precludi non, because they say that the said tract of land in that plea mentioned, always has contained, and still does contain, a lead mine of great value, and that the said lead mine was discovered and well known to the said defendant at the time he settled upon the said quarter section of land in manner and form as in said plea alleged. And this the said plaintiffs are ready to verify; wherefore they pray judgment, and their damages by them sustained, &c." To which replications the said defendant demurred generally; in which demurrer the plaintiffs joined as follows, to wit: "And the said defendant saith that the said replications to the said second and third plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same;

and this the said defendant is ready to verify; wherefore, by reason of the insufficiency of the said replications in this behalf, the said defendant prays judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against him, &c.

"BREESE & CAMPBELL, *for Deft.*"

"And the said plaintiffs say that the said replications to the said second and third pleas, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for the said plaintiffs to have and maintain their aforesaid action thereof against the said defendant; and this the said plaintiffs are ready to verify and prove the same, as the court here shall direct and award; wherefore, inasmuch as the said defendant hath not answered the said replications, nor hath he in any manner denied the same, the plaintiffs pray judgment, and their damages by them sustained, by reason of the said trespass, &c.

"J. BUTTERFIELD, *U. S. Attorney.*"

And the cause being argued before the court, upon the demurrer to said replications, the opinions of the judges of the circuit court were opposed on the following questions, namely:

1st. Does the act of Congress, entitled "An act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26th, 1834, require the President of the United States to cause to be offered for sale the public lands, situate in the land district created by said act, containing lead mines.

2d. Does the said act require the President to cause said lands, containing lead mines, to be sold, notwithstanding the 5th section of the act of the 3d of March, 1807, entitled "An act making provisions for the disposal of the public lands, situated between the United States military tract and the Connecticut reserve, and for other purposes."

3d. Are the said lands, containing lead mines, subject to pre-emption under any of the pre-emption laws which have been passed by Congress?

4th. Does the 4th section of the said act of 1834 so far repeal the fifth section of the act of 1807, as to subject the public lands, containing lead mines, to be sold by the United States in the same manner as other public lands not containing lead mines.

5th. Are the said lands, containing lead mines, subject to pre-emption or sale under any of the existing laws of Congress?

And, on application of the plaintiff's counsel, the above questions are ordered to be certified agreeably to the act of Congress to be finally decided.

I, James F. Owings, clerk of the circuit court of the United States, for the district of Illinois, do certify the foregoing to be true and correct copies of plaintiff's declaration, defendant's second,

third, and sixth pleas, plaintiff's replication to 2d, 3d, and 6th pleas, defendant's demurrer to same, and plaintiff's joinder in demurrer, and of the order of court thereupon, as the same appear of file, and of record, in the clerk's office of said court, in the case of the United States of America against Hezekiah H. Gear.

In testimony whereof, I have hereunto affixed the seal of said court, and subscribed my name, this twenty-seventh day of July, in the year of our Lord one thousand eight hundred and forty-three, and of our independence the 68th year.

[L. s.]

JAMES F. OWINGS, *Clerk*.

Filed,